89-1047

Supreme Court, U.S.
FILED
AUG 29 1989

No. _____

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

vs.

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

SHOULD A WRIT OF CERTIORARI BE GRANTED WHERE THE MICHIGAN COURT OF APPEALS REVERSED A JURY VERDICT FOR PETITIONERS IN A 42 USC 1983 CASE, AS A MATTER OF LAW WHICH THE MICHIGAN SUPREME COURT REFUSED TO REVIEW, HOLDING THAT PETITIONERS PRESENTED INSUFFICIENT EVIDENCE THAT RESPONDENT CITY OF DETROIT, BY CUSTOM AND POLICY, FAILED TO PROPERLY TRAIN ITS POLICE OFFICERS WHERE THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, INTER ALIA, SPECIFIC FAILURE TO TRAIN IN MANAGEMENT OF INTOXICATED PERSONS, SPECIFIC FAILURE TO TRAIN POLICE "DOORMEN" AND FAILURE TO GIVE POST-ACADEMY IN-SERVICE TRAINING, AND WHERE THERE WAS AN EXPLICIT FINDING IN A SPECIAL VERDICT FORM OF DELIBERATE INDIFFERENCE, IN CONFLICT WITH MONELL AS MOST RECENTLY INTERPRETED IN CITY OF CANTON, OHIO; AND WHERE THE MICHIGAN COURT OF APPEALS FURTHER FOUND THAT EVEN IF PETITIONERS HAD PROVED A FAILURE TO PROPERLY TRAIN, THERE

WAS NO AFFIRMATIVE LINK BETWEEN SAID FAILURE AND THE CONSTITUTIONAL DEPRIVATION, WHERE THE JURY EXPLICITLY FOUND PROXIMATE CAUSE AND THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, THAT THE OFFICERS WERE NOT PROPERLY TRAINED TO DO THE SPECIFIC JOBS THEY WERE PERFORMING AND THAT THOSE SPECIFIC FAILURES TO TRAIN CAUSED THE INJURIES?

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OPINION BELOW

The opinion of the Michigan Court of Appeals is not reported and is attached as Appendix A.

GROUNDS OF JURISDICTION

I. COURSE OF PROCEEDINGS

The judgment of the Michigan Court of Appeals was issued on June 2, 1987.

Petitioners' timely Motion for Leave to Appeal to the Michigan Supreme Court was denied on February 22, 1988.

Petitioner's timely motion for reconsideration was denied on May 31, 1989.

II. Statutory Provision Conferring Jurisdiction

This Petition is filed within the allowable ninety (90) day period and this Court's jursidiction is invoked under 28 USC 1257 (a).

STATUTORY PROVISION WHICH THE CASE INVOLVES

42 USC Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners in this cause were Major and Aden Boggerty. They commenced a civil action against the City of Detroit and the above-named individual Detroit Police Officers under the Federal Civil Rights Act, 42 USC 1983, for violation of constitutional rights.

On October 24, 1979, Major Boggerty was the driver of an automobile parked in front of his borther's house in the City of Detroit. Police officers Earnestine Wilson, Jackie Veasley, and Cynthia Martin had been called to the scene regarding a criminal complaint against Petitioner's brother, Robert Boggerty.

The officers asked the occupants of Petitioner's car for Robert Boggerty; he identified himself and he was arrested. Major Boggerty questioned the validity of this proceeding and was, himself, arrested by Earnestine Wilson. Both brothers were taken to the 11th Precinct station.

The basis for Petitioner's arrest remains in doubt and no warrant was ever obtained for his detention.

Petitioner was placed in a cell by Respondent Officer David Murray, the doorman. After one hour Petitioner was allowed by Murray to leave the cell to make a phone call. After the call Petitioner was asked by Murray to sign a sheet of paper, pay one hundred dollars, and be allowed to leave. At this point Petitioner's brother, in an adjoining cell began to curse Officer Murray and, in response Petitioner claims, Murray kneed Petitioner in the groin, knocked him down and repeatedly kicked him. While Petitioner was on his back three other officers held him spread eagle and beat him. A white officer appeared at the door as the assault continued.

Eventually Boggerty was placed on a bench in the fingerprint room and EMS was called. Petitioner refused their offer to take him to Detroit Receiving Hospital and, since no other aid

was offered, Petitioner's wife, Aden, and a friend transported him to Sinai Hospital near Petitioner's home.

Major Boggerty suffered a fracture of the tip of his femur and, after two unsuccessful operations to repair the fracture, he ultimately received a total hip replacement. Bedridden for six months, he was eventually totally disabled from his occupation as a boiler mechanic for the Detroit school system. Aden Boggerty was co-plaintiff upon a claim of loss of consortium.

Petitioners presented numerous trial witnesses. The individual defendants (except Murray, who did not appear) were called as adverse witnesses. Expert witnesses attested to Major Boggerty's injuries. Additionally, Petitioners called two experts to testify to the training given by Respondent City to the individual officers and to the standard of training generally.

Frank Donley, the Supervisor for Facility

Inspections for the Michigan Department of Corrections, testified that the training for personnel working in detention areas in Detroit jails failed to meet applicable professional standards.

Dr. Erik Beckman, professor of Criminal Justice at Michigan State University and a former police officer, testified that the training provided by the City of Detroit to police officers is, and had been for the last ten years, inadequate. Specifically Earnestine Wilson, David Murray and Lieutenant Warren Coleman were not properly trained for their jobs. Dr. Beckman conceded that the City may possess a good theoretical training program, but avered that they have not implemented that program and have not provided any post-Police Academy in-service training.

This cause was submitted to the jury upon a special verdict form. The seventh question on that

form asked:

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Major Boggerty's constitutional rights?

The jury answered "yes" to this question and "yes" to the next question on proximate cause. The jury then awarded actual damages of $550,000.00 to Major Boggerty and compensatory damages of $50,000.00 to Aden Boggerty.[1]

Respondent City of Detroit filed a motion for a judgment notwithstanding the verdict. On December 21, 1984, Judge Foley denied that motion.

Respondent City of Detroit appealed the verdict to the Michigan Court of Appeals; Petitioners cross-appealed. On June 2, 1987, the

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[1]The jury absolved the individual Defendants of personal liability under either negligence or intentional tort theories.

court of appeals reversed the judgment against the City of Detroit; that court also affirmed the judgment of no cause for action in favor of David Murray. Judge Hood dissented in both holdings.

Petitioners timely filed a motion for rehearing. On June 24, 1987, the court of appeals denied rehearing. Judge Hood voted to grant the motion.

Petitioners filed a motion for leave to appeal to the Michigan Supreme Court citing three questions of error. Leave was denied on February 22, 1988. Petitioners filed a motion for reconsideration which was denied on May 31, 1989.

Petitioners now file this Petition focusing on one question of error.

REASON FOR ALLOWANCE OF THE WRIT

THE HIGHEST STATE COURT IN MICHIGAN HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MICHIGAN COURT OF APPEALS REVERSED A JURY VERDICT FOR PETITIONERS IN A 42 USC 1983 CASE, AS A MATTER OF LAW WHICH THE MICHIGAN SUPREME COURT REFUSED TO REVIEW, HOLDING THAT PETITIONERS PRESENTED INSUFFICIENT EVIDENCE THAT RESPONDENT CITY OF DETROIT, BY CUSTOM AND POLICY, FAILED TO PROPERLY TRAIN ITS POLICE OFFICERS WHERE THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, INTER ALIA, SPECIFIC FAILURE TO TRAIN IN MANAGEMENT OF INTOXICATED PERSONS, SPECIFIC FAILURE TO TRAIN POLICE "DOORMEN" AND FAILURE TO GIVE POST-ACADEMY IN-SERVICE TRAINING, AND WHERE THERE WAS AN EXPLICIT FINDING IN A SPECIAL VERDICT FORM OF DELIBERATE INDIFFERENCE, IN CONFLICT WITH MONELL AS MOST RECENTLY INTERPRETED IN CITY OF CANTON, OHIO.

THE MICHIGAN COURT OF APPEALS FURTHER FOUND THAT EVEN IF PETITIONERS HAD PROVED A FAILURE TO PROPERLY TRAIN, THERE WAS NO AFFIRMATIVE LINK BETWEEN SAID FAILURE AND THE CONSTITUTIONAL DEPRIVATION, WHERE THE JURY EXPLICITLY FOUND PROXIMATE CUASE AND THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, THAT THE OFFICERS WERE NOT PROPERLY TRAINED TO DO THE SPECIFIC JOBS THEY WERE PERFORMING AND THAT THOSE SPECIFIC FAILURES TO TRAIN CAUSED THE INJURIES.

The highest State Court in Michigan has decided an important question of federal law in a

way which is in conflict with applicable decisions of the United States Supreme Court.

A Wayne County Circuit Court jury, in a special verdict form, explicitly found Respondent City of Detroit liable to Petitioners in the amount of $600,000 ($50,000 of it for loss of consortium by Petitioner Major Boggerty's wife, Aden Boggerty) for a deliberately indifferent failure to properly train its police officers as a matter of custom and policy, pursuant to 42 USC 1983.

In the face of abundant and uncontradicted evidence of such failure to train, the Michigan Court of Appeals, in a 2-1 decision, held that Petitoner Major Boggerty presented insufficient evidence to sustain the verdict. The Michigan Court of Appeals further found that even if Petitioner had proved a failure to properly train, there was no affirmative link between the failure to properly train and the constitutional deprivation, in the face of an explicit finding of

proximate cause by the jury supported by evidence.

The Michigan Supreme Court denied leave to appeal and further denied a motion for reconsideration.

The State Courts decided (and refused to review) the question of "failure to train" in conflict with, inter alia, City of Canton, Ohio v Harris, _____ US _____, 109 S Ct 1197, 103 L Ed 2d 412 (1989) since the "deliberate indifference" test was clearly met and the jury explicitly so found.

Following are some of the salient points of testimony by Petitioners two expert witnesses, excerpted from the transcripts of their trial testimony (Appendices E and F):

Dr. Beckman testified as to the Certification of the Detroit Police Academy:

> Q. I have forgotten the question. Isn't it true, Dr. Beckman, that irrespective of what standards you are talking about of the International Association of Chiefs of Police, that at all times between 1970 and 1977, the

Police Academy for the City of Detroit was in fact certified to train police officers in the State of Michigan?

A. It never lost its certification.

Q. That is my question. I don't want you to jargon on. I am asking you whether there was ever a period of time between 1970 and 1979, that the Police Academy was not certified by this agency?

A. It never went that far, but there was a threat of loss of certification.

Q. I am not talking about threats. Did the Council ever say: "You are not qualified to instruct police officers in the State of Michigan", "yes" or "no"?

A. Yes, that was said to the Detroit Police Academy.

Q. And was the certification taken away?

A. It never went that far.

Q. When was that, sir?

A. In the 1970's. (T 55)

Dr. Erik Beckman further testified as to the deficiency as far as training was concerned for

Officers Earnestine Wilson, David Murray and Lt. Warren Coleman. With respect to Earnestine Wilson Dr. Beckman testified that:

> "She was not given that training which is required, according to National Standards after the police academy, and those standards require continuous in-service training at a minimum, 40 hours a year, although that would generally be conceived as not enough, but that is an established minimum; it would not be very good. So that each police officer received refresher training as well as training in new and additional material throughout his or her police career, from the date of graduation until their retirement and Officer Wilson did not receive such training." (T 37-38)

Dr. Beckman also cited Officer Wilson's deposition in which she described the training program as a hurried-up training program. (T 35)

Regarding Patrolman David Murray the doorman, Dr. Beckman stated that "there was no special training for that particular assignment". (T 39) He went on to state that this does not meet the

national standards with respect to the training of a doorman. He further stated

> "the national standards indicate that each police officer must be trained on a regular basis after leaving the police academy, in the normal duties performed by that police officer. It has to include certain basic things as well, but it has to be job-related." (T 39)

Dr. Beckman then opined that Patrolman Murray was not properly trained as a doorman. (T 40)

Judge Hood in his dissent reiterated Dr. Beckman's statement that according to "National Standards":

> "The individual jailer or Doorman must have training in the care and safety of prisoners to detect degrees of intoxication, degrees of a person possibly under the influence of drugs, a person who might be depressed and/or suicidal. A person in need of medical attention, all of which require note-taking and classification of that prisoner, and in some cases, action upon those findings." (T 42)

Regarding whether Lt. Coleman was adequately trained to be a shift commander at the precinct level Dr. Beckman stated that Lt. Coleman's training was deficient by "the lack of annual in-service continous training that is job related". (T 44)

When asked about the training being provided by the Detroit Police Department Dr. Beckman testified that "the training method used by the Detroit Police Department, between the years 1970 and 1979, did not comport to national standards and never have. (T 45)

Mr. Frank Donley also testified that in his opinion Officer Murray was not properly trained. This was based on Officer Murray's deposition about his training in which Officer Murray stated that he received no training as a doorman and that he had not been trained to carry out the doorman function. Officer Murray further stated that he was not aware of any training programs. (T 43)

When asked as to his professional opinion as to whether the City of Detroit has a history of properly training its doorman Mr. Donley replied, "They have not been properly trained." This was based on the deposition testimony of Inspector Jackson. (T 60) Mr. Donley, when asked "Is it your professional opinion there should be an on-going training program for all doormen for the City of Detroit," he responded "Yes". (T 77) To the question "Is it your professional opinion that an on-going training program should be going on on a continuing basis?" he again responded "Yes". (T 77)

Based on the Lieutenant's deposition testimony and the deposition testimony of doorman Murray Mr. Donley stated that in his opinion they were not trained for the duties they were performing. (T 79)

Mr. Donley testified that if Officer Murray had been properly trained a visibly intoxicated prisoner would not be removed from his cell to make

a phone call. The reasoning was that a person could fight or stumble and fall and cause an injury. When a person is locked in a cell not much harm can be done to anyone. (T 46)

Mr. Donley also stated that whether Petitioner was drunk or sober the training was not adequate:

> Q. You testified that the lieutenant and the Doorman, in your opinion, their training was not appropriate?
>
> A. Yes.
>
> Q. Is your testimony that you don't have to conclude whether or not this gentleman was intoxicated, to arrive at that conclusion?
>
> A. That's correct.
>
> Q. It doesn't matter to you one way or the other?
>
> A. It does not.
>
> Q. You are saying, that whether he was drunk or if he wasn't drunk, if he was sober, they weren't appropriately trained to handle him?
>
> A. That is correct.
>
> Q. So you are saying this training wasn't adequate, right across the board?

A. Yes. (T 99-100)

The above is but a sample of the relevant testimony by the experts. Additional dispositive testimony will be cited below as applicable.

Petitioners' suit under this statute alleged, and proved, that the City of Detroit, as a matter of custom and policy, failed to properly train the individual defendant police officers and this failure to train was the proximate cause of Major Boggerty's serious physical injuries. The special verdict form (Appendix D) was clear and unequivocal in presenting that issue to the jury as Question Seven. The jury then found that the training was improper and was the proximate cause of the injury. Boggerty and his wife were awarded damages. A motion for judgment nothwithstanding the verdict was denied.

The Michigan Court of Appeals, nevertheless, reversed the judgment on the basis that the Petitioners' evidence was not sufficient to sustain

the verdict.

Both the majority and dissenting opinions in the Michigan Court of Appeals recognized that a verdict will not be upset unless the evidence is insufficient as a matter of law. Further, the appellate court must view the evidence in the light most favorable to Petitioners and give them the benefit of every reasonable inference that can be drawn from the evidence. See Napier v Jacobs, 145 Mich App 285, 291, 377 NW2d 879 (1985).

The majority opinion, however, after paying lip-service to the above standards, concluded that the evidence was insufficient directly in the face of clear evidence which, at the very least, would have allowed reasonable minds to differ on this question. In doing so the majority ignored the pertinent factual evidence and misapplied the relevant law.

In Ford v American National Insurance Company, 46 Mich App 368, 208 NW2d 226 (1973), the court

held that a reviewing court may not reverse the finding of a jury unless reasonable minds could not disagree; a jury's verdict is entitled to an even higher degree of appellate respect than a trial judge's factual findings, and where the trial judge has reviewed the verdict and approved it, appellate review is even more limited. Id. at 372.

Petitioners' proofs presented clear and convincing evidence that the City was deliberately indifferent in its training practices for police officers. Even if one puts aside the particular and peculiar facts surrounding Major Boggerty's arrest, detention, and handling, the conclusion is still inescapable that there was a proper question for jury consideration. Even if we forget that the arresting officers could never agree on what charge Petitioner was arrested; forget that if Petitioner was sober he should not have been arrested and if drunk should not have been removed from his cell; forget that no reasonable police explanation exists

for Petitioner's injuries; even fogetting all this, the jury was still given other convincing testimony upon which to base liability.

The Special Verdict form given to the jury, Question 7, was as follows:

> SECTION 1983 (City of Detroit): Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff MAJOR BOGGERTY'S constitutional rights?
>
> YES___X_____ NO_____
>
> If the answer to the above was YES, then determine whether this was a proximate cause to Plaintiff MAJOR BOGGERTY'S injuries. If the answer to the above is NO, then go on to Question No. 8.
>
> Was the City's liability above the proximate cause of Plaintiff MAJOR BOGGERTY'S injuries?
>
> YES___X_____ NO_____

(Emphasis added)

The Supreme Court in City of Canton, Ohio v

Harris, _____ US _____, 109 S Ct 1197, 1204, 103 L Ed 2d 412 (1989) held:

> We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.[8] (Emphasis added)

Footnote 8 states:

> 8. The "deliberate indifference" standard we adopt for Section 1983 "failure to train" claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation. For example, this Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case - a denial of the due process right to medical care while in detention - is established. Indeed, in Revere v. Massachusetts General Hospital, 463 U.S. 239, 243-245, 103 S.Ct. 2979, 2982-2983, 77 L.Ed.2d 605 (1983), we reserved decision on the question of whether something less than Eighth Amendment's "deliberate indifference" test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody. . . .

> Second, the proper standard for determining when a municipality will be liable under Section 1983 for constitutional wrongs does not turn on any underlying culpability test that determine when such wrongs have occurred.

(Emphasis added)

Under exactly the standard this Court has now set - the "deliberate indifference" standard - the jury, under an explicit instruction to that effect, found Respondent, City of Detroit, liable to Petitioners. Petitioners had to, and did, overcome this more stringent hurdle even before this Court established it. It is, therefore, unconscionable for Petitioners to have had their jury verdict taken away.

The Court in City of Canton, supra at 1205, perceptively further held:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the

> need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[10] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.[11]

(Emphasis added)

Footnote 10 states:

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need.

(Emphasis added)

The example focused on by this Honorable Court is exactly the situation in the instant case. Petitioners' expert, Dr. Beckman, testified as follows to the need for further training after the police academy and the absence thereof (T 37-38, Appendix E):

Q. In what ways, Doctor, was Earnestine Wilson deficient as far as training was concerned?

A. She was not given that training which was required, according to National Standards after the Police Academy, and those standards require continuous in-service training at a minimum, 40 hours a year, although that would generally be conceived as not enough, but that is an established minimum; it would not be very good. So that each police officer received refresher training as well as training in new and additional material throughout his or her police career, from the date of graduation until their retirement and Officer Wilson did not receive such training.

(Emphasis added)

City of Canton further noted, at 1205-1206:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.

Dr. Beckman, as shown above, gave expert testimony on just that relation. He testified that the individual officers, Murray (as doorman), Wilson (as arresting officer) and Coleman (as officer in charge of the precinct) were not properly trained

to do the specific jobs they were doing, which led to Petitioner's injury.

That testimony, moreover, establishes the "affirmative link" or, as the jury specifically found, the proximate cause. (See also p. 31, infra)

It is noted that in the part concurrence and part dissent of Justice O'Connor, City of Canton, 109 S Ct at 1209, she took the majority to task stating that "the diagnosis of mental illness is not one of the 'usual and recurring situations with which [the police] must deal'." The issue of diagnosing insobriety, however - one of the issues in the instant case - is, indeed, the paradigm of a usual and recurring police situation.

Justice O'Connor also took issue with the majority's decision to let the Court of Appeals decide, on remand, whether to allow the case to proceed under the "deliberate indifference" rule. Justice O'Connor stated, supra at 1210, "Allowing

an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of Monell," (emphasis added) and went on to cite Oklahoma City v Tuttle, 481 US 808, 105 S Ct 2427, 85 L Ed 2d 791 (1985). Nevertheless, even though City of Canton was based on but a single incident, the majority did allow for the possibility of the case going to a jury.

In Oklahoma City v Tuttle, 105 S Ct at 2436 the Court held:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.

(Emphasis added)

Footnote 7 states, however:

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general "inadequate training" alleged here, can ever meet the "policy" requirement of Monell. . .

This Court in City of Canton, supra, 109 S Ct at 1203, reaffirmed that the issue is still left unresolved. Further at 1203-1204:

> The claim in this case, however, is that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train. For reasons explained below, we conclude, as have all the Courts of Appeals that have addressed this issue,[6] that there are limited circumstances in which an allegation of a "failure to train" can be the basis for liability under Section 1983. Thus, we reject petitioner's contention that only unconstitutional policies are actionable under the statute.

(Emphasis added)

Thus, whatever the langugage in Tuttle, this Court in City of Canton established:

(1) that a policy need not be unconstitutional to be actionable under 42 USC 1983

(2) that inadequate training, if based on deliberate indifference, can sustain an action based on a single incident.

Note that in City of Canton, 109 S Ct at 1201, the jury's verdict did not state the basis on which it had ruled for Mrs. Harris, thus allowing the impermissible possibility that the verdict was based on mere respondeat superior. Not so in the instant case. The "deliberate indifference" rule was specified in the Special Verdict form.

In Rymer v Davis, 754 F2d 198 (CA 6, 1984) vacated and remanded 473 US 901; 105 S Ct 3518, 87 L Ed 2d 646 (1985), reinstated 775 F2d 756 (CA 6, 1985), the Sixth Circuit wrote, 775 F2d at 757:

> In the instant case, the jury was instructed:
>
> If you find for the plaintiff with regard to his claim of excessive force, then you will consider the claim of excessive force, then you will consider the claim made by him against the City of Shepherdsville; and if you find from the preponderance of the evidence that the City of Shepherdsville trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevitable or would be properly characterized as substantially certain to result, then you shall

> find for the plaintiff against the City of Shepherdsville.
>
> Thus, the City of Shepherdsville was found liable based upon a finding by the jury that the City of Shepherdsville inadequately trained its police officers. No inference from a single incident of excessive force was involved. Consequently, the City was not held liable because it "hired" 'one bad apple,' " id. at 2435, but because the City was itself a bad actor in failing to train its police force. Consequently, Tuttle is not controlling, rather, this case presents the exact issue upon which the Court refused to express an opinion. See id. 2436 N. 7.

(Emphasis added). On that instruction (and the evidence adduced at trial) the Court of Appeals let the jury verdict stand. This Court in City of Canton, supra, 109 S Ct at 1201 cited Rymer without disapproval. It is essential to note that the jury instruction in the instant case contained every element of the Rymer instruction plus the "deliberate indifference" language now required by City of Canton.

In Rymer, 754 F2d at 201, FN 1, the Court held

that "the type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question." Well, in the instant case, the jury decided that question and found enough evidence to bring in a verdict for Petitioners. It is unconscionable and reversible error to take that verdict away.

As to the "affirmative link" between the custom and/or policy and the constitutional deprivation, the jury found proximate cause, based on evidence. An affirmative link can be imputed, but there is a direct link in the instant case.

Dr. Beckman testified (T 81, Appendix E):

> Q. . . .What training do you understand the police didn't receive that would have prevented them from doing that? [to knee Major Boggerty in his groin]
>
> A. Training in the use of force, the limitations of the law regarding use of force.

That is evidence of a "direct causal link" which is

the first inquiry in a case alleging municipal liability under 42 USC 1983. City of Canton, 109 S Ct at 1203. As this Court admits, "the inquiry is a difficult one," id at 1203.

Further, in City of Canton, 109 S Ct at 1206, this Court held:

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.[12] Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact-finder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

(Emphasis added). If the jury does not have an easy task, all the more its decision should be

respected. The jury was adequate to its task. The judge was adequate to his task, giving an impeccable instruction and denying judgment notwithstanding the verdict.

Unfathomably, the Michigan Court of Appeals majority found that the "affirmative link is missing", after conceding that said link can be "actual or imputed." (Opinion, P. 7 & 8. Appendix A). The Court majority also said, at P. 8:

> Further, the quantum of evidence needed to establish the "affirmative link" is considerably greater where, as here, the particular custom that plaintiffs claim resulted in their injuries involves a course of municipal inaction that is a good deal removed from the constitutional deprivation alleged.

That requiring of a greater quantum of evidence is in conflict with this Court in City of Canton, 109 S Ct at 1204, FN 8, holding that municipal liability does not turn on any underlying culpability test. Further, the allusion to municipal action "a good deal removed" is

inapplicable to the facts of this case. The majority cited Tuttle, supra, with no specific page cite. The Tuttle example, 105 S Ct at 2436, is:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

That is certainly not the kind of remote "but for" situation in the instant case. Moreover, that example was given in the context of the preceding sentence, at 2436:

> And in the second place, some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter.

As shown above, City of Canton established that a policy need not be unconstitutional to be actionable under 42 USC 1983.

The Michigan Court of Appeals majority also

held (Opinion, P. 8, Appendix A):

> Plaintiffs presented no evidence of similar incidents at other precinct lockups.

The majority footnoted to Tuttle. As shown above, City of Canton, and Tuttle itself, established that a single incident can impose liability if the proof of the single incident includes proof that it was caused by an existing custom or policy, whether it be constitutional or unconstitutional.

The dissent by Judge Hood, in the 2-1 Michigan Court of Appeals decision, would have been held as follows:

> As indicated by its special verdict, the jury in the instant case accepted plaintiff's theory that defendant had a custom or policy of inadequately training its officers in the care and custody of intoxicated persons.
>
> In support of this theory, plaintiffs introduced the testimony of two expert witnesses. Dr. Beckman stated that according to "National Standards" a doorman must have training in the care and safety of prisoners to detect degrees of intoxication or drugs. Based upon his review of Murray's deposition, Beckman concluded that

Murray had had no special training for his position as doorman and accordingly, that Murray had not been properly trained. In addition, Beckman opined that neither Lieutenant Coleman nor Officer Wilson had been properly trained. Finally, when questioned on the overall training provided by the City of Detroit between the years 1970 and 1979, Beckman responded that the training methods "did not and never have" met the National Standards.

Dr. Donley concurred in Beckman's assessments. Like Beckman, Donley testified that Murray had not been properly trained as a doorman. . . Donley explained that a visibly intoxicated prisoner should not be removed from his cell to make a phone call for a number of reasons:

> "Well, there is a number of reasons. A person could fight. When he is in the cell, locked in a cell, it is very unlikely -- not much harm can be done to anybody. If he is taken out of the cell and his contact with an officer or people out in the lobby area, he can cause quite -- if a person is in fact intoxicated, stumble and fall and cause an injury."

In addition, Lieutenant Coleman

testified that letting plaintiff, an allegedly intoxicated prisoner, out of his cell to make a phone call was consistent with procedures in effect at the precinct.

When this testimony is viewed in a light most favorable to the plaintiffs and plaintiffs are given the benefit of every reasonable inference which can be drawn from the evidence, I conclude that sufficient evidence was presented to establish that the City either had a policy of failing to train its doormen or that the training provided was so grossly negligent that it amounted to "deliberate indifference". Furthermore, Donley's testimony establishes that the lack of adequate training was likely to cause the very danger which befell plaintiff. Because the doorman was inadequately trained, he permitted a visibly intoxicated person to leave his cell thereby rendering it likely that an injury would occur. Accordingly, the jury could infer that by failing to train its doormen, the City exhibited a deliberate indifference to the resulting violation. That there was testimony that the city met state standards is not dispositive if those standard are themselves inadequate.

The City contends that municipal policy could never be established absent deliberate action by a designated municipal policymaker. While concedely, Justice Rehnquist, in a footnote to Tuttle raises the question, he also

specifically refused to address it. See 85 L Ed 2d 804, fn 7. And the actual holding of Tuttle is far more limited. Tuttle stands for the proposition that an isolated incident of police mis-conduct can never establish municipal liability. Since plaintiffs' allegations of municipal policy are supported by more than the single incident complained of, Tuttle does not bar recovery in the instant action. Moreover, in light of the expert testimony regarding the City's training program, the jury could infer that the absence of adequate training or the failure to routinely implement adequate training was a conscious decision by the City's policymakers.

Unlike the situation in Tuttle, plaintiffs here presented evidence of a city-wide lack of adequate training, or at least, a grossly negligent training program. The jury's decision was not based on the single, isolated incident but rather on the City's overall failure to provide adequate training as testified to by Beckman and Donley. The expert testimony was sufficient to establish a municipal policy upon which to render the City liable. . .

Unlike the majority, I would hold that plaintiffs did establish an "affirmative link" between the City policy and the constitutional deprivation. Tuttle, 105 S Ct 2436. Both experts testified that proper training would have alerted a doorman to the dangers inherent in caring for intoxicated prisoners.

> Moreover, Donley specifically stated that one of the dangers attendant upon letting an intoxicated person out of his cell was that the prisoner might stumble and fall and injure himself. Accordingly, the complete failure to train the doorman made the risk of personal injury highly likely and the City's failure to train could be viewed as the "moving force" of the violation, i.e. the injury. I would affirm.

(emphasis added)

Petitioners submit that Judge Hood recognized the issues correctly and properly applied the law to the facts elicited.

Donley and Beckman were qualified expert witnesses who obviously helped convince the jury that the Respondent City of Detroit invited liability by refusing to properly train its police officers. In stark contrast, the City presented no evidence whatsoever to refute the Petitioners' position.

How is it possible then for the Court of Appeals majority to view this evidence most favorably to Petitioners, give every reasonable

inference to Petitioners, and still overturn the verdict of the jury and reverse the trial court for sustaining that verdict?

The majority opinion cites a considerable body of law to support its position, but the cases are inapplicable to the case at bar. The Court of Appeals majority relies on Daniels v Williams, ____US____; 106 S Ct 662; 88 L Ed 2d 662 (1986) and Davidson v Cannon, ____ US ____; 106 S Ct 668; 88 L Ed 2d 677 (1986). Both of these United States Supreme Court decisions are based on the premise that negligent conduct of municipal employees does not establish a policy or custom so as to make a city liable under Section 1983. No such "negligence" claim is involved here. The same is true of the cases cited in the various circuit courts of appeal (Hamilton v Rogers, 791 F2d 439 (CA 5, 1985); Jones v City of Chicago, 787 F2d 200 (CA 7, 1986)).

When the question before appeallate courts has

been whether proper police training brought about the injury, as opposed to the negligence of the officer, then it has almost universally been held to be a jury question. See Bergquist v County of Cochise, 806 F2d 1364 (CA 9, 1986) and cases cited therein at 1370.

The Michigan Court of Appeals majority, in an opinion which is recommended for publication, has adopted a standard for civil rights claims in this state at variance with the standards set by the United States Supreme Court. The majority also ignored the palpable existence of sufficient evidence of deliberately indifferent failure to properly train and of the affirmative link between said failure and the constitutional deprivation.

Petitioners submit that their Petition for Writ of Certiorai should be granted.

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